***United States Court of Appeals***

***for the Second Circuit***

# PETITION FOR REHEARING EN BANC

75-6121

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ANNICK M. BERNS,

Plaintiff-Appellee,

-against-

CIVIL SERVICE COMMISSION, CITY OF NEW YORK, ALPHONSE E. D'AMBROSE, Personnel Director, Department of Personnel, MICHAEL J. CODD, as Police Commissioner, City of New York, and HARRISON J. GOLDIN, as Comptroller, City of New York,

Defendants-Appellants.

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On Appeal From a Judgment of the United States District Court for the Southern District of New York

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NOTICE OF MOTION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC AND AFFIDAVIT IN SUPPORT

W. BERNARD RICHLAND,
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566-4337

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ANNICK M. BERNS,

Plaintiff-Appellees,

-against-

CIVIL SERVICE COMMISSION, CITY OF NEW YORK, ALPHONSE E. D'AMBROSE, Personnel Director, Department of Personnel, MICHAEL J. CODD, as Police Commissioner, City of New York, and HARRISON J. GOLDIN, as Comptroller, City of New York,

Defendants-Appellants,

NOTICE OF MOTION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC.

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Appeal From a Judgment of the United States District Court for the Southern District of New York.

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S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of L. KEVIN SHERIDAN, sworn to July 13, 1976, and the papers heretofore filed with this Court on the above appeal, the undersigned will move this Court, pursuant to Rule 40, Fed. R. App. Proc., for rehearing of its determination on the above appeal, and, in the alternative, should rehearing not be granted and the relief sought on rehearing granted, will suggest, pursuant to Rule 35, Fed. R. Civ. Proc., that this appeal be heard in banc.

The ground for the motion and suggestion is that the Court's opinion appears to be based, at least in part,

on a misapprehension of New York law.

Dated: July 13, 1976

W. BERNARD RICHLAND,
Corporation Counsel
Attorney for Defendents-Appellants
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TO:

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ANNICK M. BERNS,

Plaintiff-Appellee,

-against-

CIVIL SERVICE COMMISSION, CITY OF NEW YORK, ALPHONSE E. D'AMBROSE, Personnel Director, Department of Personnel, MICHAEL J. CODD, as Police Commissioner, City of New York, and HARRISON J. GOLDIN, as Comptroller, City of New York

Defendants-Appellants

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Appeal From a Judgment of the United State District Court for the Southern District of New York

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AFFIDAVIT IN SUPPORT OF MOTION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

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STATE OF NEW YORK )
:SS.:
COUNTY OF NEW YORK )

L. KEVIN SHERIDAN, being duly sworn, deposes and says:

1. I am Assistant-in-Charge of the Appeals Division in the Office of W. BERNARD RICHLAND, Corporation Counsel of the City of New York, attorney for the defendants-appellants herein. I make this affidavit in support of appellants' motion for rehearing of the Court's determination, dated June 29, 1976, on the above appeal, and their suggestion, in the alternative, of in banc rehearing.

2. In its opinion in this case this Court held that "the procedure through which [appellee] was terminated violated her due process rights under the Fourteenth Amendment" (Slip opn. p. 4520) and that, by being retained as a police administrative aide beyond the expiration of her probationary period, she "acquired an 'enforcible expectation of continued public employment'... and her employment could not thereafter be terminated in the absence of procedural safeguards, including at a minimum, a predismissal hearing of the charges made against her" (id., p. 4522 - citation omitted). The Court further held that the requirement of a predismissal hearing was "not altered by the provisions of New York Civil Service Law §50(4) which permit the [Civil Service Commission] to investigate the qualifications of an employee after appointment and to revoke the appointment upon finding facts which if previously known would have disqualified the appointee." Id. p. 4523

3. The Court concluded that under §50(4) the New York courts would hold Berns not subject to summary dismissal, but rather entitled to a pre-termination hearing. In support of this view the Court cited Canarelli v. New York State Dept. of Civil Service, AD 2d , 353 N.Y.S. 2d 275 (4th Dept., 1974), and Kelliher v. New York State Civil Service Comm'n, 194 N.Y.S. 2d 89 (Sup. Ct., Dutchess Co., 1959). Based upon this view of state law, this Court indicated that Berns could not be removed for failure to meet the eligibility requirement for her position unless her removal was "preceded by a hearing at which she may present evidence to support her

alleged satisfaction of eligibility requirements. Id., p. 4525 ). Apparently this refers to a "trial type" hearing, for, as the opinion notes (id., p. 4521), Berns did appeal the determination that she was disqualified to the Civil Service Commission, which appeal was decided adversely to her, but at which she was free to submit whatever written documentation she cared to in support of her claim that she met the eligibility requirements for appointment to this position.

4. Preliminary, we would note, neither Canarelli nor Kelliher speaks to the issue of whether a person removable under §50(4) is entitled to a pre-termination hearing, or to the issue of what type of hearing may be required under §50(4). Indeed, Kelliher holds the section altogether inapplicable to the error there claimed in appointing that petitioner and in Canarelli, while the Court held there should be a "hearing ... at which petitioner[would] be afforded an opportunity to present evidence" (353 N.Y.S. 2d at 278), the Court did not indicate what type of hearing was required, i.e. , trial type, personal appearance or written submission (compare Boddie v. Connecticut, 401 U.S. 371, 377-379 (1971); Goss v. Lopez, 419 U.S. 565, 577-584 (1975); Frost v. Weinberger, 515 F. 2d 57, 65-68 (2d Cir. 1975); Matter of Balash v. New York City Employees' Retirement System, 34 N.Y. 2d 654, 656 (1974). Quite to the contrary, it appears to be settled law in New York that generally no hearing at all is required prior to removal of a public employee pursuant to §50(4). See ,e.g., Matter

of McShane v. City Civil Service Comm. of the City of New York, 51 AD 2d 521 (1st Dept., 1976); Matter of Rosano v. The City of New York, Sup. Ct., N.Y. Co., 1975 (Hughes, J.), N.Y.L.J. 7/11/75, p. 9, col. 8; see, also, Matter of Kelliher, supra, 194 N.Y.S. 2d at 90-91.

5. In the McShane case, as in Canarelli, the Court held that under the special circumstances there presented a hearing was required (see 51 AD 2d at 522), but the Court specifically rejected McShane's contention that completion of the probationary period insulated him from removal except pursuant to Civil Service Law §75, which we understand to be the position of plaintiff-appellee in this case, i.e., that she can only be removed for misconduct or incompetence (see Complaint, pars. 31-33, Joint Appendix, pp. 14a-16a), not that she was entitled merely to a further, more elaborate hearing before the City's Civil Service Commission on the issue of her eligibility for appointment.

6. When we prepared out appellant's brief on this appeal we did not understand the appellee to be seeking the type of relief which the Court ended up granting her, to wit, a further hearing limited only to the issue of whether she met the eligibility requirements. Accordingly, we did not elaborate on this point, and thus what we view as the Court's error in interpreting New York Civil Service Law §50(4) may be due to our failure to call to the Court's attention cases such as McShane, where the point is quite

clearly made that generally no hearing is necessary in connection with a removal pursuant to §50(4). As a result of this failure on our part, and what we believe is clear error in the Court's view of New York law on this issue, not only was this appeal, we believe, wrongly decided, but the law on this issue, which is a recurring issue, is thrown into confusion, with the state courts likely to follow McShane, but with the federal district courts very likely to follow this Court's view that a tenured employee cannot be removed pursuant to §50(4) without a pre-termination trial-type hearing.

7. Such confusion is not merely a speculative possibility, but is quite real. Indeed, there are cases now pending in the district court where the same issue is presented and the district judges have requested briefs discussing the applicability of this Court's decision in this case. Thus, while were this but an isolated case, unlikely to recur, we would be content to abide by the Court's decision, however incorrect we thought it, given the scope of the problem created for the City's Civil Service Commission if all such terminations are in the future to be preceded by hearings, and the confusion that is likely to occur depending upon the forum chosen for challenging past terminations, we believe rehearing is essential in this case.

8. In Bishop v. Wood, 44 U.S.L.W. 4820 (U.S. June 10, 1976), cited in this Court's opinion, the Supreme Court clearly indicated that the question of whether a state public employee has a property interest in employment turns on State law, and as a matter of New York law it is clear that, but for the possible applicability of §50(4) of the Civil Service Law, the appellee enjoyed a property interest in her employment. However, it is, we believe, just as clear as a matter of New York law that such property interest is conditional and such an employee can be stripped of the protection of §75, entitling a tenured employee to a trial type hearing where he is to be removed for misconduct or incompetence, where it is determined, pursuant to §50(4), that his appointment was improper. That is precisely what occurred here, and, we submit, it was error for this Court to hold, contrary to New York law, that as a matter of federal due process the appellee could be removed pursuant to §50(4) only after a hearing.

9. As both Canarelli and McShane demonstrate, removals pursuant to §50(4) are challengeable in the New York courts on grounds of arbitrariness, and in appropriate cases administrative hearings may be required, but we do not believe the existence of such State rights and remedies suffices to make the right here involved into a property right recognizable

in federal court. On the contrary, this right and the existence of such State remedy, is far closer to that of the probationary employee, who as a matter of New York law is protected against arbitrary or capricious removal (Matter of Talamo v. Murphy, 38 N.Y. 2d 637 (1976), but is not thought to enjoy a protected property interest in his employment such as to raise a question of federal due process entitling him to a pre or post-termination hearing. Cf. Paul v. Davis, 44 U.S.L.W. 4327, 4343 (U.S. March 23, 1976); Bishop v. Wood, supra, 44 U.S.L.W. at 4822-4823.

10. Moreover, even if it should be held that the appellee had rights under New York law sufficient for the Court to hold that the protection of the due process clause is here involved, it does not necessarily follow that a pre or post-termination trial type hearing was required. Here, in fact, a form of hearing was provided, a written appeal on which appellee was free to submit whatever documentation she cared to submit, and, we would submit, this was sufficient to satisfy any requirement of due process in connection with her removal. The appellee's right to continued employment was made expressly conditional upon her non-removal pursuant to §50(4), and removal on the grounds contemplated by that section would not ordinarily be expected to involve the sort of issues, such as misconduct or incompetence, where a hearing would be considered essential to proper administrative action. On the contrary, in the ordinary case

of removal based on ineligibility it could be expected that the evidence of ineligibility would be, as here, objective in nature and in the vast majority of cases not seriously challengeable (indeed, even this Court's opinion does not suggest that appellee has any chance of success in showing that she met the eligiblity requirement for this position).

11. As this Court has already indicated, the question of what type of hearing due process requires, and when such hearing should be accorded, varies according to the circumstances and interests involved. See Frost v. Weinberger, supra, 515 F 2d at 65-66; see, also, Boddie v. Connecticut, supra, Goss v. Lopez, supra. The teaching of these cases is clear--it is not enough to say that due process interests are implicated in order to require a pre-termination trial-type hearing. The New York courts are sensitive to the need for such a hearing in appropriate cases under §50(4), but this requirement should not be engrafted generally on the statute. In most cases it is totally unnecessary, and, we believe, it is not required as a matter of federal due process.

12. Quite clearly, if New York Law extended no tenure protection to public employees, they would not enjoy a federally protected "property interest" in their continued employment. Bishop v. Wood, supra. Under New York law such employees do enjoy tenure protection, subject to summary removal pursuant to §50(4), but with a State protected right against arbitrary or capricious removal pursuant to that section. Given this

State of New York law, we would suggest that this is an inappropriate area for according relief in federal court (See Bishop v. Wood, supra, 44 U.S.L.W. at 4822-4823), but rather this is an appropriate case for holding that any error on the part of local personnel officials should be corrected "in other ways" (id., p. 4823). If we are wrong in this view, it still does not follow that a pre-termination trial-type hearing is in all instances necessary to protect these State created rights.

13. Because this case presents issues which are most important and likely to recur, and because we believe the Court seriously erred in its determination, we believe rehearing should be granted and upon rehearing it should be held that summary judgment dismissing the Complaint should be entered.

WHEREFORE, it is respectfully requested that rehearing be granted and upon rehearing the Court direct that summary judgment dismissing the Complaint be entered; in the alternative, we suggest that rehearing in banc should be ordered.

L. KEVIN SHERIDAN

Sworn to before me this
13th day of July, 1976.

GAIL KATZ
Commissioner of Deeds
City of New York, No. 4-1755
Certificate filed in New York County
Commission Expires November 1, 1977

Gail Katz

## AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Peggy Wright being duly sworn, says that on the 13 day of July 1976, he served the annexed Not. of Mot. + Affid. upon Samuel Resnicoff Esq., the attorney for the Pltff - appellee herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 280 Broadway in the Borough of Manhattan, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this
13 day of July 1976

Gail Katz

Commissioner of Deeds
City of New York, No. 4-1753
Certificate filed in New York County
Commission Expires November 1, 1977

Peggy Wright

Form 323-50M-701067(75) 346